United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-1043

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD A. GORDON, ETC.,

Appellant,

v.

NEW YORK STOCK EXCHANGE, INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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I N D E X

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STATEMENT OF THE ISSUE PRESENTED

The primary issue presented by this case, and the only issue which the United States as amicus curiae will discuss, is whether the district court properly granted summary judgment and dismissed an antitrust action challenging the fixing of commission rates by the defendants on the ground that such conduct is permitted by the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq., subject to the exclusive review jurisdiction of the Securities and Exchange Commission, and therefore immune from the antitrust laws.

INTEREST OF THE UNITED STATES 1/

The United States, through the Attorney General and the Department of Justice, has the primary responsibility for enforcement of the antitrust laws. The aim of that enforcement is to encourage and facilitate economic competition among independent business entities, and thereby to maximize for all Americans the benefits of the free enterprise system. In the words of the Supreme Court, competition is our "fundamental national economic policy". Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966). In addition to this general policy of competition, Congress has also determined that certain industries must be subject to varying degrees of governmental regulation in the public interest. The fact that an industry is subject to regulation, however, does not mean that competition should play no role therein. The existence of regulation and competition within a single industry is not contradictory. See Northern Natural Gas Co. v. Federal Power Commission, 399 F.2d 953 (D.C. Cir. 1968). In short, the existence of a regulatory scheme for an industry does not confer on that industry a general exemption from the antitrust laws.

1/ The views expressed in this brief represent the views of the United States Department of Justice. The Securities and Exchange Commission has taken a different position on the issue discussed herein, and, we have been informed, intends to file an amicus brief in support of the decision below.

In the case of the securities industry, Congress had sought through the Securities Exchange Act to insure that trading in securities is conducted pursuant to regulations and practices which protect investors and insure fair dealing. In the leading case of Silver v. New York Stock Exchange, 373 U.S. 341 (1963), the Supreme Court held that the Securities Exchange Act did not establish a complete exemption from the antitrust laws for "self-regulatory" conduct of exchanges. The Court established the principle that "repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357. The instant case marks the first time where this Court has been called upon to apply the principles of Silver to conduct of an exchange which is subject to limited review jurisdiction of the Securities and Exchange Commission under Section 19(b) of the Act, 15 U.S.C. §78s(b). Careful reconciliation of both the Securities Exchange Act and the antitrust laws so as to insure the greatest degree of permissible competition in the securities industry is a difficult and important matter, and one with which the United States has a major interest.

STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York

(Hon. Morris E. Lasker) granting the motion of the defendants 2/ for summary judgment on the ground that the plaintiff's 3/ antitrust action could not be maintained because "the practices complained of are within the exclusive jurisdiction of the Securities and Exchange Commission, that the SEC, acting pursuant to §19(b) of the Exchange Act of 1934, 15 U.S.C. §78s(b), has been actively regulating these practices, and that, consequently, the practices are exempt from the provisions of the antitrust law so that the court is without subject matter jurisdiction." (App.).

The complaint challenged the action of the defendant exchanges in (1) instituting a "surcharge" on transactions of less than 1000 shares, (2) instituting a "volume discount" on "large transactions", (3) institution the negotiation of commission rates on those portions of trades in excess of $500,000 (now $300,000) while retaining a schedule of fixed

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2/ The defendants are the New York Stock Exchange ("NYSE"), the American Stock Exchange, and two member firms of the exchanges, Merrill Lynch, Pierce, Fenner, & Smith, Inc., and Bache & Co., Inc., "individually and as representatives of all member firms."

3/ The plaintiff is Richard A. Gordon, president of the Independent Investors Protective League. The action was brought as a class action on behalf of the members of the League and "the remaining members of the Class of 'small investors' who purchase stocks listed on the [defendant exchanges] in amounts less than Five Hundred Thousand ($500,000) Dollars for each purchase." (Complaint, ¶5). The district court did not decide whether the suit could be maintained as a class action and no issue related to the appropriateness of the purported "class" is presented by this appeal.

minimum commissions for smaller trades, and (4) preventing the use of their facilities by non-members and the sharing of commissions between members and non-members, thereby preventing the plaintiff from effectuating substantial commission savings. The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1,2, and of the Robinson-Patman Act, 15 U.S.C. §13(a).

The defendants filed affidavits of two officials of the NYSE and one official of the American Stock Exchange in support of the notion for summary judgment. These affidavits purported to show that the actions of the defendants with respect to commission rates were taken under the supervision and with the approval of the SEC. In opposition to the motion, an affidavit of the plaintiff and a verified statement of his counsel were submitted which purported to show that the SEC had not approved the defendants' changes in commission rates.

In granting the motion for summary judgment, the district court made several preliminary rulings before dealing with the primary question of the defendants' immunity from the antitrust laws. The court held that the plaintiff could not challenge the limit on the number of memberships in the exchanges and the limitation on non-member access, both on the grounds that he lacked standing since he had not applied for membership and that the nature of an exchange contemplates limited membership. The court also held that

the Robinson-Patman Act does not apply to stock trade transactions and therefore plaintiff's claims based upon price discrimination could not be maintained. 4/

The basic holding of the district court, however, was that "this court lacks jurisdiction to entertain an anti-trust attack on the commission structure of the Exchanges, since the fixing of commissions falls squarely within the congressional policy of exchange self-regulation embodied in the 1934 Act." (App.) In making this broad ruling, the district court, as did the defendants, treated the plaintiff's somewhat inartfully drawn complaint as a broad challenge under the antitrust laws generally to the practice of fixing minimum rates of commission. The court held that Silver v. New York Stock Exchange, supra, "contemplates" antitrust immunity for exchange self-regulation which is subject to SEC supervision. The district court did not make a specific finding that the SEC had actually approved the challenge commission rate practices. Nonetheless, the court noted that the SEC has held public hearings and investigated the exchanges' rate structure and has indicated

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4/ While the United States takes no position with respect to this issue, we do note that there is authority in support of this position (see Baum v. Investors Diversified Services, Inc., 409 F.2d 872 (7th Cir. 1969)).

an intent to require a termination of all fixed commissions after April 30, 1975. Therefore, the court concluded, "It is fair to infer that the SEC is continuing to exercise its jurisdiction actively over rate-setting, pursuant to §19(b)(9) of the Act." (App.). The court also referred to Congressional consideration of proposed legislation which would order elimination of fixed commissions and concluded that "Congress does not now regard fixed rates as offensive to the Exchange Act or the antitrust laws." (App.).

The district court followed the decision in Kaplan v. Lehman Brothers, 250 F. Supp. 562 (N.D. Ill. 1966), affirmed, 371 F.2d 409 (7th Cir. 1967), cert. denied, 389 U.S. 954 (1967), as "the case most in point" although the court also recognized that Kaplan, which held that a challenge to the fixing of commission rates as a per se violation of the Sherman Act could not be maintained, "is distinquishable on its facts." (App.). The court attempted to distinguish the more recent decision of the Seventh Circuit in Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971), apparently primarily on the ground that Thill involved the sharing of commissions with non-member brokers rather than the fixing of commission rates charged to the public. However, the court also seemed to recognize that its holding was inconsistent with the decision in Thill for it said, "we are in disagreement with the Seventh Circuit." (App.). On this basis, the district court dismissed the complaint.

ARGUMENT

I. "SELF-REGULATORY" CONDUCT OF SECURITIES EXCHANGES IS IMMUNE FROM ANTITRUST LAWS ONLY TO THE EXTENT NECESSARY TO MAKE THE EXCHANGE ACT WORK

The court below determined that since the Securities Exchange Commission possesses certain "review" authority over exchange fixing of commission rates pursuant to Section 19(b)(9) of the Act, 15 U.S.C. § 78s(b)(9), the plaintiff's antitrust action could not be maintained.

The defendants' motion for summary judgment was granted on the basis of affidavits submitted by the defendants which purported to show that the SEC was cognizant of the exchanges' practices with respect to commission rates and had from time to time "reviewed" and indeed "approved" such rates and permitted proposed changes to take effect. As noted above, however, the parties are in disagreement as to whether the SEC in fact "approved" the defendants' alterations in commission rates. It, therefore, appears that the district court in effect resolved questions which are not appropriate ones for summary judgment but which should be decided only after an opportunity for full development of all relevant facts. See Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962). Moreover, the court below made no ruling with respect to the question of whether the fixing of rates of commission is necessary to achieve the purposes and goals of the Securities Exchange Act or even whether the SEC ever considered that question.

The Department of Justice submits that the approach adopted by the court below misconceives the relationship between the antitrust laws and the 1934 Exchange Act as interpreted by the relevant decisions of the Supreme Court and various Courts of Appeals, and approved in recent reports of Congressional committees. The correct rule is that antitrust immunity for practices of securities exchanges should be implied only if the challenged practice is necessary to make the Exchange Act work and then only to the minimum extent necessary. 5/

Any analysis of the relationship between the antitrust laws and the Securities Exchange Act of 1934 must begin with the Supreme Court's decision in Silver v. New York Stock Exchange, 373 U.S. 341 (1963). In that case, the Court held

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5/ This appeal presents no question as to whether and under what procedures the district court should obtain the views of the SEC. The defendants' motion and supporting argument for summary judgment was based only on the purported exclusive jurisdiction of the SEC to review commission rate fixing of exchanges. Even if the views of the SEC may be of use to the district court, the essential legal question of reconciling the antitrust laws and the Exchange Act is one for the courts to resolve. Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973). As the district court noted, the SEC has been considering the question of commission rates and has determined that all fixed commissions should be eliminated by April 30, 1975. In these circumstances, there would appear to be no useful reason to refer any issue in the antitrust case to the SEC.

that the Securities Exchange Act did not grant a general immunity or exemption from the antitrust laws for "self-regulatory" conduct of exchanges. The Court recognized that in certain instances, however, conduct which might otherwise violate the antitrust laws could be held exempt from those laws if such conduct was necessary to effectuate the regulatory scheme. The Court held that "repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." 373 U.S. at 357. 6/ Before a court can determine that challenged conduct is immune from the antitrust laws, it must find that the conduct is the least restrictive way to achieve the purposes of the 1934 Act. "[E]xchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act . . . " Id. at 361.

6/ This holding is, of course, an application of well-established rule that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963).

The Court emphasized the importance of preserving antitrust scrutiny of exchange conduct to the greatest extent feasible: "Since the antitrust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable." Id. at 359-60. 7/

In Silver, the Court noted that the specific exchange conduct which was being challenged was not subject to SEC review. However, the Court's language to the effect that even Commission rules must be "consonant with the antitrust laws," id. at 364, n. 16, indicates that the Court intended the Silver reconciliation standard to be applied to exchange rules which are subject to SEC review. In subsequent cases,

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7/ In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, ________ U.S. __________, 94 S. Ct. 383 (1973), decided this Term, the Supreme Court reaffirmed the Silver principle that only exchange self-regulation which is necessary to achieve the goals of the Exchange Act is immune from the antitrust laws: only "particular instances of exchange regulation that fall within the scope and purposes of the Act may be justified and will be upheld against antitrust challenge." 94 S. Ct. at 389.

moreover, it has been established that the Silver test applies equally to situations where the challenged conduct may be subject to SEC consideration under Section 19 or other provisions of the Exchange Act.

The leading case is Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971). In Thill, the plaintiff challenged the NYSE rules prohibiting the sharing of commissions between members and non-members, including non-member brokers. The district court in Thill granted the defendant's motion for summary judgment on the ground that since the fixing and regulating of commission rates was subject to SEC review under Section 19(b) and the SEC apparently was exercising such review jurisdiction, the conduct was immune from the antitrust laws. The court of appeals reversed, holding that the correct standard for determining antitrust exemption is not the existence of SEC jurisdiction under Section 19(b), but rather whether the challenged conduct is necessary to make the Exchange Act work. The court held that "even the fact that the SEC may be exercising its proper supervisory power over the rules of the Exchange does not in and of itself cloak the Exchange with antitrust immunity for its conduct relating to those rules." 433 F.2d at 271. The court continued: "Most important, before a court may abdicate its jurisdiction on the antitrust issue the defendant must establish its anticompetitive conduct as justified because

it is necessary for the operation of the Securities Act." _Id_. at 273. Elsewhere the court emphasized: "Before the investing public of the United States may be deprived of the benefit of competition through the vehicle of Exchange rules, it must be established that the Exchange's exemption from the antitrust laws is necessary to discharge its responsibilities under the Securities Exchange Act . . . . In short, its exemption must be based on a showing of true necessity." _Id_. at 269. In discussing the _Silver_ case, the court said, "we find in the teachings of _Silver_, no 'intimation' that the mere possibility of SEC review wraps the conduct of the Exchange in an impregnable shield of antitrust immunity." _Ibid_. 8/

The court below ignored the _Thill_ decision, however, for Judge Lasker stated he was "in disagreement with the Seventh Circuit . . ." The court not only ignored the _Thill_ decision, but also a similar holding of the Fifth Circuit in _Harwell_ v. _Growth Programs, Inc._, 451 F.2d 240 (5th Cir. 1971), _opinion on rehearing_, 459 F.2d 461 (1972), _cert. denied_, 409 U.S. 876 (1972). In _Harwell_, the challenged conduct

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8/ The court of appeals reaffirmed its decision in _Thill_ in the course of its subsequent opinion dismissing an appeal by the NYSE denying a referral of the issues in the case to the SEC. See _Thill Securities Corp._ v. _New York Stock Exchange_, 469 F.2d 14, 15 n. 3 (1972).

concerned a rule adopted by the National Association of Securities Dealers, an organization subject to the 1938 "Maloney Act" amendments to the Exchange Act. The Maloney Act, unlike the 1934 Act, specifically provides that if any provision of that Act is in conflict with any other law, the provision of the Maloney Act shall prevail. 15 U.S.C. §78o-3(n). The court in Harwell applied the Silver test and determined that immunity from the antitrust laws existed only for "those things necessary to carry out the purposes of the Act." 451 F.2d at 247. The Fifth Circuit cited the Thill decision with approval in holding that the NASD rule was not exempt from antitrust challenge merely because the NASD "acted under close supervision of the SEC." Ibid. In ruling on a petition for rehearing, the court of appeals specifically held, citing Thill, "If on remand the proof should show that defendants have taken actions which violate the anti-trust laws, and if, in accordance with the principles of Silver . . . ., the district court should find that the purposes of the Maloney Act do not require that these actions be cloaked with antitrust immunity, then the mere supervisory presence of the SEC cannot divest the courts

of their power to enforce the antitrust laws." 459 F.2d at 462. 9/

The principle established by the Silver, Thill and Harwell decisions is that immunity from the antitrust laws exists only for conduct which is necessary to make the Securities Exchange Act work and which is no more restrictive than necessary. This test applies whether or not the challenged conduct may be subject to SEC review pursuant to Section 19(b) of the Act. While the court below disagreed with this principle and refused to apply it in ruling on the defendants' motion for summary judgment, it has received the strong

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9/ In Haddad v. Crosby Corp., 1973-2 Trade Cases ¶74.841 (D.D.C. 1973), the district court dismissed an antitrust case challenging certain resale price maintenance practices engaged in by the defendants in the sale and distribution of mutual fund shares. The court held that Section 22 of the Investment Company Act of 1940, 15 U.S.C. §80a-22, established a pervasive regulatory framework for the sale and distribution of mutual fund shares which precluded the development of a "secondary market." Therefore, the court found limited antitrust immunity "in the narrow area of distribution and sale of mutual fund shares . . . ." Id. at 95,752. In view of the court's reliance upon and analysis of the specific provisions of the Investment Company Act, this decision is of no assistance to the present defendants in establishing an immunity from the antitrust law for commission rate fixing on exchange transactions. It should also be noted that both the United States and the private plaintiffs in the Haddad case have filed timely notices of appeal.

approval of the two Congressional committees with jurisdiction over securities legislation. 10/ The Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce stated in its 1972 "Securities Industry Study":

> The Subcommittee reads Silver and Thill as standing for the proposition that any rule of an exchange is immune from the antitrust laws only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary, even if the challenged rule has been submitted to the SEC pursuant to the Commission's rule 17a-8 or is subject to Commission action under section 19 of the Securities Exchange Act. The Subcommittee believes that this rule is clear and is correct, both as to what the law is and as to what the law should be. pp. 160-61.

The Subcommittee Report continues:

> We find Judge Campbell's opinion in Thill compelling, and can add little to it . . . . The Subcommittee does not believe that the Congress intended in 1934 nor does it intend today that the limited review power granted to the Commission in the Securities Exchange Act should insulate the rules of national securities exchanges from antitrust scrutiny. p. 161.

The 1973 "Securities Industry Study" of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs summarized the applicable legal principles as follows:

> The basic substantive principle for reconciling the antitrust laws and self-regulation under the 1934 Act emerges with some clarity from the Silver,

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10/ We recognize, of course, that Committees do not legislate or adjudicate. However, the views of these expert bodies, especially where made after extensive study and public hearing, are entitled to substantial consideration and respect.

> Thill, and Harwell cases. Anti-competitive conduct of self-regulatory bodies is immune from antitrust attack only if the conduct is necessary to make the statutory scheme of regulation work and then only to the minimum extent necessary. This immunity is not increased or broadened in the event that the action in question is subject to SEC review or even if it is in fact approved by the SEC. The SEC has no power to immunize anti-competitive self-regulatory conduct from the operation of the antitrust laws. p. 227.

The Subcommittee Report noted that it was essential to preserve antitrust review of exchange conduct "to protect the public and competitors against unjustified anti-competitive restrictions . . . ." (p. 221) After fully analysing the arguments made to confer antitrust immunity upon exchange self-regulation, at least where the conduct is subject to SEC review, the Subcommittee concluded:

> In short, the Subcommittee believes that the principles enunciated by the courts provide the proper basis for reconciling the great purposes of the antitrust laws and the securities laws. The Subcommittee also believes that the courts, with their antitrust expertise, are the appropriate forum in which to apply these principles. Although the Subcommittee recognizes the genuine concern which has been expressed about the possible consequences adverse to the public interest resulting from the existing state of the law, the Subcommittee notes that all of these adverse consequences are theoretical and speculative while many of the benefits resulting from the application of the antitrust laws to the securities industry are real and apparent. p. 240.

While the court below noted that Congress has been considering proposed legislation which would mandate the elimination of fixed commission rates by a date certain, there is no indication that Congress intends to confer antitrust immunity upon the exchanges. The appropriate

Committees of Congress, after extensive public hearings including testimony from the New York Stock Exchange and the SEC, concluded that the present legal standard as developed in the Silver, Thill and Harwell cases is appropriate and should not be changed. We are aware of no precedent - and the court below cited none - for the proposition that a federal court should decline to consider the merits of an alleged antitrust violation (or any other violation of law) merely because a member of Congress had introduced a bill to achieve a result similar to that sought in the litigation. It is, of course, uncertain at this time what legislation, if any, will be enacted relating to the subject matter of the pending litigation. In short, any assertion that Congress desires that the federal courts not determine the merits of an antitrust suit on the basis of existing principles of law appears to be totally without foundation.

The court below appeared to rely primarily on the decision in Kaplan v. Lehman Brothers, 250 F. Supp. 562 (N.D. Ill. 1966), affirmed, 371 F.2d 409 (7th Cir. 1967), cert. denied, 389 U.S. 954 (1967), as "the case most in point." Kaplan involved a challenge to the fixing of commission rates as a per se antitrust violation and the plaintiff appeared not to recognize that, under the Silver test, even if a per se antitrust violation is established, the defendants could attempt to justify their conduct by showing that it

was necessary to achieve the purposes of the Exchange Act. But for this, collective rate-fixing would be illegal per se. Moreover, as the court of appeals in Thill noted, "even the 'broad language' of Kaplan" would not support the argument that potential review by the SEC provides that agency with exclusive jurisdiction and creates an immunity from the antitrust laws. 433 F.2d at 271. The court below also failed to note that Mr. Chief Justice Warren registered a vigorous dissent to the denial of certiorari in Kaplan, characterizing the lower courts' action, which Judge Lasker repeated here, as a "blunderbuss approach [which] falls far short of the close analysis and delicate weighing process mandated by . . . Silver." 389 U.S. at 957. It should also be noted that to the extent that Kaplan is inconsistent with Thill, the Thill decision, as discussed above, represents the correct view of the law as accepted by other courts and the Congress. 11/

An important factor which should be considered in determining whether the SEC has exclusive jurisdiction to review exchange "self-regulation" is the highly informal

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11/ The Report of the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce stated, "Although the court of appeals [in Thill] attempted to distinguish Kaplan from Thill, the Subcommittee does not believe the cases are significantly different, and thus we read Thill as overruling Kaplan sub silentio." (P. 160).

and often non-appealable nature of the Commission's dealings with the exchanges, particularly the NYSE. For example, much of the consideration which the SEC has given over the years to the problems of rate schedules, non-member access, and other related matters occurred informally, without public knowledge and without detailed records. See generally Comment, Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange, 80 Yale L.J. 811 (1971).

Even when the SEC sends a "letter of suggestion" to the NYSE, there is substantial doubt that any judicial review is available to an aggrieved party. For example, in Independent Investor Protective League v. SEC, (2d Cir. No. 71-1924, dismissed without opinion, January 1972), this Court dismissed a suit seeking review of the SEC's September 24, 1971, letter to the NYSE concerning the Exchange's proposed commission rate changes. The SEC argued successfully in that case that its letter did not approve the proposals and was not a reviewable agency order. 12/ The SEC told this Court that its action "was anything but a 'definitive' determination 'dealing with the merits' of the Exchange's rule amendments." (Br. of the SEC, p. 7). If this Court were to accord exclusive jurisdiction to the SEC in the present case after dismissing a direct challenge to the

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12/ But see Independent Broker-Dealers' Trade Association v. SEC, 442 F.2d 132 (D.C. Cir. 1971), cert. denied, 404 U.S. 828 (1971).

SEC's "action" relating to some of the very practices challenged in this case, opponents of an exchange rule would be afforded neither adequate appellate review nor an opportunity for de novo antitrust challenge. The exchanges would be free to adopt virtually any anti-competitive rule under the guise of "self-regulation," subject only to whatever review the SEC in its own discretion thought appropriate, with no independent judicial determination of whether the conduct was indeed "necessary to make the Exchange Act work". 13/ This danger we submit fully justifies the approach adopted in the Silver, Thill and Harwell cases that antitrust immunity is to be implied for Exchange conduct only if

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13/ Compare Moss v. C.A.B., 430 F.2d 891 (D.C. Cir. 1970), where the court criticized the Civil Aeronautics Board for setting rates by negotiating its informal approval of carrier-initiated rate schedules during a "closed session with carrier representatives, without statutory public hearings . . . . " 430 F.2d at 900. Under such a procedure, the Court said, the public would not only be "fenced out of its role in rate-making, but judicial review of the Board's actions would be severly limited." Ibid.

it is shown that the challenged conduct is necessary to make the Exchange Act work. This approach should be adopted by this Court. 14/

14/ In Stark v. New York Stock Exchange, 346 F. Supp. 217 (S.D.N.Y.), affirmed, 466 F.2d 743 (2d Cir. 1972), the district court denied a preliminary injunction to enjoin the expulsion of a member firm of the Exchange for violating the Exchange's rules regarding institutional membership. The court, however, granted an injunction against expulsion of the plaintiff Stark individually. This preliminary decision appears based upon a weighing of who would suffer irreparable harm. The district court went on to suggest that the SEC's review of the institutional membership question would be sufficient to immunize the NYSE from antitrust challenge. The court, nonetheless, recognized that it was "a triable issue of fact . . . whether the exception by implication carved out of the anti-trust laws in the case of Silver v. N.Y.S.E., supra, covers the issues here." 346 F. Supp. at 230. This Court did not approve the district court's broad dicta in affirming the denial of the preliminary injunction.

II. THE LEGISLATIVE HISTORY OF THE EXCHANGE ACT DOES NOT DEMONSTRATE AN INTENT TO IMMUNIZE FIXED COMMISSION RATES FROM ANTITRUST CHALLENGE

This district court based its decision in part on the belief that the Securities Exchange Act "gives the Exchange and the Commission the power to 'fix' commission rates." (App.) As we have already demonstrated, the courts have held that antitrust immunity may be implied for exchange practices only where they are necessary to make the Exchange Act work. The grant of limited review authority to the SEC under Section 19(b) does not confer an automatic immunity from the antitrust laws. In this section we will briefly review the legislative history of the Exchange Act to show that Congress did not intend to immunize the fixing of commission rates from antitrust challenge.

The purpose of Congress in passing the Securities Exchange Act of 1934 was to protect investors by preventing manipulation, deceptive practices and excessive speculation. The Senate Report on the bill states: "The three principal problems with which the bill deals are the excessive use of credit for speculation, the unfair practices employed in speculation, and the secrecy surrounding the financial condition of corporations which invite the public to purchase their securities." S. Rep. No. 792, 73d Cong., 2d Sess., p. 5 (1934).

Section 19(b) of the Act specifically confines the SEC's authority to alter or supplement exchange rules to situations where "such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange."

Given the primary concerns of Congress in drafting federal regulation of the securities industry, it is not surprising that little attention was paid to fixed minimum commissions. The legislative history does indicate, however, that §19(b)(9) of the Act was intended to protect investors from exorbitant charges, not to prevent price competition among exchange members.

The original draft of the bill as reported out of the Senate Committee on Banking and Finance and passed by the Senate provided that "the Commission may fix or prescribe the method of fixing uniform rates of commission . . . ." In commenting on this provision, Samuel Untermeyer, who had served as counsel in an earlier Congressional investigation of stock exchanges, noted that "the commission rates on the purchase and sale of securities have been practically doubled in recent years." He urged that the word "uniform" be stricken arguing, "[T]he commission charged should either be fixed by some governmental authority or be supervised by such authority. As matters now stand, the exchange can

charge all that the traffic will bear, and that is a burden upon commerce."15/ In the House, the word "uniform" was replaced with "reasonable" and the bill as finally enacted refers to "reasonable rates of commission." Neither the Senate or House Reports nor the Conference Committee Report specifically discusses this provision.

The Report of the Pecora Investigation, however, which was issued contemporaneously with the passage of the 1934 Act, concluded that "the cost to the American public of maintaining the securities markets has been staggering." S. Rep. No. 1455, 73rd Cong., 2d Sess., p. 6 (1934). The Report then set forth statistics on brokerage commissions and profits of NYSE and other exchange members, as well as the losses to the public from the decline in stock prices as a result of speculative and manipulative practices. It would be as unreasonable to suppose that the 1934 Congress wanted to protect brokers from possible lower profits resulting from competitive commissions as to conclude that Congress wanted to protect brokers from possible lower profits resulting from the elimination of various manipulative and speculative practices. That Congress was aware in 1934 that the exchanges fixed commissions in no way indicates any

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15/ Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency, 73rd Cong., 2d Sess., p. 7705 (1934).

legislative judgment that fixing minimum commissions was necessary to any public purpose or that doing so was or should be immune from antitrust challenge. The limited legislative history on the point indicates only that Congress desired to ensure that the new SEC could protect investors against unreasonably high commissions while leaving the practice of fixing commissions (and other exchange practices) subject to other applicable provisions of law, including the antitrust laws.

This analysis of the relevant legislative history is in accord with the principle that exemptions from the antitrust laws are not lightly implied; a clear expression of Congressional intent is required to establish a repeal of the antitrust laws as a result of passage of a regulatory statute. See, e.g., United States v. Philadelphia National Bank, supra; Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973); United States v. Borden Co., 308 U.S. 188 (1939).

We believe that this interpretation of the legislative history of the 1934 Act is also supported by the later action of Congress in passing the Maloney Act. The Exchange Act as originally adopted dealt with the over-the-counter market in very general and brief terms. It did permit the SEC to adopt rules and regulations "necessary or appropriate in the public interest and to ensure investors protection comparable to

that provided . . . in the case of national securities exchanges." In 1938, Congress enacted the Maloney Act (codified as 15 U.S.C. §78o-3(a)(n), known as §15A of the Exchange Act) to provide for the formation of national securities associations and to grant the SEC certain supervisory authority over the rules and operations of such associations.

Sec. 15A(b)(8), 15 USC §78o-3(b)(8), provides that a national securities association may not be registered unless the Commission finds that

> the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges.

In addition, Sec. 15A(n) provides that if any other provision of law in effect when the Act was passed conflicts with the Act, "the provision of this section [the Maloney Act] shall prevail."

It is clear that Congress intended to prohibit any establishment of commission schedules for the over-the-counter ("O-T-C") market. The Report states that an association of brokers may impose rules to provide safeguards against

unreasonable profits, but "may not impose any schedule of prices or commissions." S. Rep. No. 1455, 75th Cong., 3d Sess., p. 7 (1938). Thus, when Congress specifically considered the question of fixed minimum commissions and their relationship to investor protection, it concluded that neither fixed minimum nor even fixed maximum commissions were necessary to protect investors or to achieve free and open securities markets; indeed, it concluded that fixed commissions were inappropriate in furthering these goals. Therefore, in the case of O-T-C associations any system of fixed commission rates would be a direct violation of the Maloney Act (and, since not necessary to achieve the purposes of Act, also a violation of the antitrust laws). In the case of exchanges, Congress did not specifically outlaw fixed commissions. Neither did it indicate that fixed commissions are necessary to achieve the purposes of the Act. Therefore, the appropriate test for determining their legality is whether the practice is necessary to achieve the purposes of the Act and thus immune from the antitrust laws.

As noted above, both the Subcommittee on Securities of Senate Committee on Banking, Housing and Urban Affairs and the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce have agreed that the 1934 Exchange Act does not contain a general immunity from the antitrust laws for exchange "self-regulatory"

conduct. Rather, the correct rule is that a court will imply immunity only for conduct which is necessary to achieve the purposes and goals of the Act. This brief review demonstrates that the Silver, Thill, and Harwell decisions are consistent with the relevant legislative intent.

CONCLUSION

For the reasons stated the district court improperly granted summary judgment and dismissed the complaint. The court below could properly find antitrust immunity for the challenged conduct of the defendants only upon a determination that the conduct is necessary to make the Exchange Act work. The district court made no such finding and in the present posture of the case had no basis for determining this issue. Therefore, the case should be remanded for further appropriate proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Seymour H. Dussman, hereby certify that on this 29th day of March, 1974, I caused to be served by United States Mail, first class postage prepaid, two copies of the foregoing Brief for the United States as Amicus Curiae upon each of the following:

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